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CONSTITUTIONAL LIMITATION OF MUNICIPAL DEBTS.

[Second part]

MONEYS IN THE TREASURY.

The act of April 20th, 1874, as we have seen, directs that the net amount of indebtedness of a municipality only shall be considered as the indebtedness, increase of which is restrained, and it requires that this net indebtedness shall be ascertained by deducting from the gross amount of the debt "the money in the treasury." If A has $1,000 and owes $1,000 we are not in the habit of saying that he is not in debt. There is no very philosophical reason for distinguishing between property of a city in the form of money, and its property in the form of buildings, lands, etc. If the money in the treasury is applied to the proposed debt, so as to qualify it to be contracted, other unavoidable expenses will need to be met from additional revenues. However, the direction of the statute is uniformly observed, and money in the treasury, capable of being applied to the existing debt, or to the proposed increase is deducted from it[1]. A contract for a sewer stipulating for the payment of $9,300 "out of the general sewer fund" the court assumed that that fund was sufficient to pay it, in the absence of an averment in a case stated, that it was insufficient.[2] If the money in the treasury of a school district is the product of a loan whose validity is contested because of its

[1]Addyston Pipe Co. v. City of Corry, 197 Pa. 41; Brown's Appeal, 111 Pa. 72; Spangler v. Gallagher 182 Pa. 277; Dolan vs. School District, 10 Dist. 694.

[2]Addyston Pipe Co. v. City of Corry, 197 Pa. 41.

alleged excess beyond 2 per centum of the valuation, it cannot be treated as legitimately in the treasury and applicable to debts, other than the bonds for which it was paid in. The school district must return the money in good faith, the bonds being void[3].

ALL OUTSTANDING SOLVENT DEBTS.

The 5th section of the act of April 20th, 1874, directs the subtraction of "all outstanding solvent debts" from the gross indebtedness, in order to ascertain the size of the debt, with a view to determine whether it exceeds 2 per centum or 7 per centum of the valuation. These solvent debts are debts due by solvent debtors to the city, borough, county, etc., the legality of whose increase of debt is in question[4]. The county, e.g. may have certain credits for taxes with the state[5] e.g. $30,000 due from the state treasurer,[6] a credit of $323,943.18 from the state for overpayments of taxes on watches and money at interest.[7] Taxes, assessed in previous years and still due, or collectable, are to be considered as assets, available for the discharge of debts, and their amount will, like other solvent debts, be deducted from the gross debt. Thus $13,000 overdue taxes were so deducted in Spangler v. Gallagher[8]. If a school district has lost a part of its territory, by the creation out of a part of it, of a borough and new school district and the latter is bound to pay the former a sum of money on account of a disproportionate amount of school property embraced within the new district, this money may be regarded as reducing the indebtedness of the original district, although the question of what the new district owes to the old, is still undecided by the auditor.[9]

ASSETS IN THE SINKING FUND.

The act of 1874 makes it the duty of cities that are indebted to provide a sinking fund for the final extinction of the debt.

[3]Luburg's Appeal, 1 Mona. 329. In Davis v. Braddock 48 Pitts. 145, Evans J. defines the debt of the constituency to be that which one is bound to pay to another, irrespective of his ability to pay. He suggests that "net" debt is not the expression used, that the money in the treasury may be spent in other ways than that of reducing the debt, and the revenue of the year may likewise be so spent.

[4]Brown's Appeal, 111 Pa. 72.

[5]111 Pa. 72.

[6]Spangler v. Gallagher. 182 Pa. 277.

[7]Brown's Appeal 111 Pa. 72.

[8]Id.

[9]Dolan v. Lackawanna Township School Dist. 694.

The city may from time to time buy its own certificates of indebtedness, or its bonds, and place them in the sinking fund. When it does so the indebtedness has been *pro tanto* extinguished, whether the certificates or bonds have been cancelled or not. Of the as yet uncancelled debt of Philadelphia, being $52,758,-845.22, $23,130,100 were in the sinking fund having been purchased by the city's money. In order to ascertain the actual debt with a view to deciding whether a proposed increase was within the proposed 7 per centum limit it was necessary to deduct the latter sum from the former[10]. But for some reason, it is suggested by Dean J. that other securities than those of the city, and money in the sinking fund, cannot be subtracted from the debt. As to these last he says "obviously they remain in the fund bound by the inviolable pledge which attached to them when they first became part of it. So far as concerns them, they have not yet been applied in payment or redemption of any part of the funded debt. An asset of the city, easily convertible into cash, they undoudtedly are, but as yet they have not operated to the reduction of the funded debt, to which purpose they are pledged. In effect they only represent the savings of the city, set aside in anticipation of payment of the debt; as to any actual reduction of the debt by them, there has been none. The debt is still an outstanding liability unaffected by the savings, with only an increased ability on part of the city to pay; an increase in ability measured by the cash value of the savings. When used in purchase of the debt, there is a release of the pledge, and a discharge of the obligation, to the amount of the purchase." If "moneys in the treasury," "solvent debts" owed to the city, all revenues applicable within the year to debt, are to be subtracted from the gross debt it is difficult to see why money or the equivalent, in the sinking fund, shall not be subtracted.

THE VALUATION.

The 8th section of Article IX of the Constitution of 1874, enacts that "the debt of any city * * * shall never exceed 7 per centum upon the assessed value of the taxable property therein; nor shall any municipality or district incur any new debt, or increase its indebtedness to an amount exceeding 2 per centum upon such assessed valuation of property, without the assent

[10]Brooks v. Phila. 162 Pa. 123. Houston v. Lancaster, 191 Pa. 143; Pepper v. Philada. 181 Pa. 566; Bruce v. Pittsburgh, 166 Pa. 152.

of the electors", etc. The property in a city may be assessed at one amount for city purposes, and at a different amount greater or less, for county purposes. In such case, which of the valuations furnishes the standard for determining whether a debt is or is not permissible? Legislation applicable to cities of the second class, the act of May 5th, 1876, P. L. 124, provides for a board of city assessors, who are to make an assessment. In doing so they take as a basis the assessments returned by the ward assessors to the county commissioners. They have power to raise, equalize or alter such assessments by increasing or reducing them. "When said board shall have altered and amended the list of all taxable property, so as to arrive at its true cash valuation, they shall then ascertain the aggregate amount of the value of the entire taxable property of said city, which shall remain the lawful valuation for purposes of city taxation." This city valuation, whether it be greater or less than the county valuation, is the valuation, 2 per cent, or 7 per centum of which is intended by the constitution.[11] That the city authorities, in order to increase their borrowing power, may fictitiously increase the county valuation is evident. If it appeared that they had done so, what the result would be, is not visible. The mere fact that the one valuation is higher than the other, warrants no inference that the city valuation is too high. The county valuation may as readily be too low.[12]

The 29th section of the act of May 8th, 1854, provides that the adjusted valuation for county purposes shall be furnished by the county commissioners to the school directors, and shall be the basis of taxation for school purposes. A levy by the school controllers upon an assessment made by the ward assessors in 1889 would not be a valid assessment. It should be made on the valuation of 1888, adjusted by the county commissioners.[13] The assessed valuation of property in a township, as fixed and returned by the assessors to the county commissioners was $4,193,-521. The commissioners, as a board of revision, reduced the amount to $1,050,124. The latter is probably the valuation which would be regulative of the borrowing power of the township[14].

[11]Bruce v. Pittsburg; 166 Pa. 152; Dupont v. Pittsburg, 69 Fed. Rep. 13.
[12]Id.
[13]Witherop v. Titusville School Board, 7 C. C. 451.
[14]Plains Township's Appeal 21 Super. 68.

VALUATION MAY INCLUDE OCCUPATIONS.

The constitution and statutes speak of the "assessed value of the taxable property", the "assessed valuation of property", but other things than property in the usual sense of that term, occupation, for example, may be made a subject of taxation. May the taxable value of occupations be included in the assessed valuation? In Brown's Appeal[15] the assessed valuation of Allegheny county was found to be $240,100,244. It embraced however, occupations. Excluding these, it would have been $198,-382, 414.25. It was proposed to create a new debt by the erection of a court house, which debt added to preexisting debt would make an aggregate debt less than 2 per centum upon the actual valuation, but more than 2 per centum upon the valuation from which occupations were eliminated. The creation of the new debt, without a vote of the electors was held permissible. If occupations are sources of revenue, under the exercise of the taxing power, there seems to be no good reason for excluding the valuation of them from the "assessed valuation" of the constitution.

THE VARIABLENESS OF THE VALUATION.

The constitution forbids that a municipal debt should ever "exceed 7 per centum upon the assessed value of the taxable property;" or that a debt "exceeding 2 per centum upon such assessed valuation of property" should be incurred without the consent of the electors. The act of April 20th, 1874, and the act of April 13th, 1897, define the valuation as "the last preceding assessed valuation." After a debt is contracted, its ratio to any particular valuation may be increased or decreased, in consequence of variations in these valuations from the one immediately preceding the formation of the debt. Such variations are ignored. If the debt was valid when contracted, it is not made invalid by a subsequent reduction of the assessment; if invalid, it does not become valid because of any subsequent increase of the assessment.[16] The property in a city, borough, etc. may fluctuate in value, or new methods of appraisement may in-

[15]111 Pa. 72.

[16]On Sept. 30, 1891, Corry's debt was in excess of 7 per cent of the valuation, which was $1,359,096. The debt was $122,300. Since April, 1898, the valuation is $1,685,077; the debt is $98,000. But the validity of a debt contracted Sept. 30th, 1891, must be determined by the facts then existing, Addyston Pipe Co. v. City of Corry, 197 Pa. 41.

dicate a difference in value; or the municipality may suffer reduction of area[17]. The reduction of the area of a school district, increasing the ratio of its debt to the value of the property in the reduced area, would not impair a previously created debt[18].

TIME BY REFERENCE TO WHICH VALIDITY OF DEBT IS DETERMINABLE.

A contract may impose an instant and unconditional duty to pay money now, or a duty to pay unconditionally at a future time or times. It may impose a duty to pay money at a future time or at future times, if certain things shall, at the arrival of these times, have been done by the other party to the contract. It is said generally, that the validity of a contract must be determined when the determination is made subsequently, as of the time the contract was made.[19] The facts then existing only, may be considered. If the debt is payable the year of its making, and the revenues of that year, properly expectable, will be sufficient to pay it together with the other usual expenses, no improper debt is contracted, however large the existing debt may be. Suppose the debt created is payable in installments, e.g., it arises from a lease of land, the rental from which is to be paid each year. If the revenues of the first year will be enough to pay the rent of that year, and those of the second year, will probably be enough to pay the rent of that year, etc., is the debt a permissible one, without regard to the aggregate debt of the municipality? In Booth v. Weiss[20] the city of Philadelphia contracted with Weiss for the use by it of an engine house for 10 years, at a certain yearly rental. Mitchell J. refrained from considering whether city councils could make a contract for rent to be paid out of the current revenues of the future years, so as to bind future councils to raise and appropriate the money, and thus in effect increase the debt which their revenues must pay,

[17]Plains Township Appeal 21 Super. 68.

[18]Parker Township School District v. Bruin Borough School District. 13 Dist. 769. "If", says Mitchell J., "a city at the time of making a contract, levies a special tax in good faith supposed to be adequate to meet it, but in consequence of fire or flood or decline in values, the result is an insufficient fund," the contract good when made, would not become bad; Addyson Pipe Co. v. City of Corry, 197 Pa. 41.

[19]Addyston Pipe Co. v. City of Corry, 197 Pa. 41. Hence an increase of the amount of property in a city, since the contraction of the debt, or the reduction of the debt since, cannot be regarded.

[20]15 Philadelphia 159.

because the contract in question pertained to the ordinary expenses of the city, and the annual revenues were sufficient over and above the ordinary expenses of the city government to meet the rent proposed to be paid. The court refused to declare the contract void, and to restrain payment of the rent, observing that the rent, whose payment was objected to, is for property now occupied by the city, for a purpose which is part of its ordinary administration of government; that the money to pay the rent of the current year has been duly appropriated by councils, and that it is now, actually or potentially in the city treasury. Under these circumstances, it refused to "speculate on the consequences of a different state of facts possible to arise hereafter." "For the present" said the court, "it is sufficient that there is no case for the intervention of a court of equity." In Miller v. Pittsburg[21] it was thought important that contracts made in 1900 for work and materials in the erection of a school building, not completed that year, nor the following, were within the limit of current revenue in taxes [of what year is not clear, probably of that during which, by the completion of the work, the money would become payable] and that the levy heretofore made was sufficient to pay the contracts in full "as they will from time to time be performed," besides the current expenses of the school district. A contract for electric light for 7 years, at a cost of $1600 per year, was held valid. because the annual payment was within the current revenues, that is, apparently would continue to be for the remaining six years, within the revenues. The continuance of the revenue at its present magnitude, was apparently postulated.[22]

CASES HOLDING A CONTINUOUS CONTRACT INVALID.

There are cases which hold that contracts for payments ranging over a number of years, are not valid because each annual payment is within the revenue of the year. A contract for the construction of water-works for the city, at a cost of $6,000 annually for 20 years provided that the payments should be made annually from the current revenues of the city (and not otherwise,) and that, if the revenues should be insufficient, the interest of the city in the works should revert to the con-

[21]201 Pa. 397.

[22]Wade v. Oakmont Borough 165 Pa. 479. In Rainsburg Borough v. Fagan. 127 Pa. 74, costs and fees in certain suits were a valid debt, for which bonds could be issued.

tractor. It was held invalid, as making a debt in excess of 2 per centum of the valuation, without a popular vote. Apparently conceding that if the contract had pertained to ordinary expenses for a term of years, and if the amount annually payable under it could have been paid from current revenues, it would have been valid, the contract for water-works was not deemed one for ordinary expenses.[23] A contract for the erection of a school building, for the sum of $148,970, which stipulated that it should create no debt to K, the builder, except for work and materials furnished, of the value of the funds legally available to the school board for building purposes, at the time of the making of the contract, and that work should cease as soon as there should be no such available funds, was held to create a debt in excess of the school district's power. "If," says Miller, P. J., "there were nothing more in these contracts than to provide for the district's ordinary expenses, within the current revenues, the conclusion of Wade v. Oakmont Borough, 165 Pa. 479, might be applicable, but the erection of this school building is an extraordinary expense."[24] A contract between the city of Erie and R provided that R should erect a market house; that the city should use it, paying, for 25 years, an annual rental equal to six per cent of the cost; and that the city might within the 25 years purchase the building. An illegal debt was held to be created, the city indebtedness already exceeding 7 per cent of the valuation of property. It is assumed that the current revenues were not enough to yield $1,500, the annual rental, in addition to what was already necessary for the current expenses.[25]

THE STATEMENT.

The act of April 13th, 1897, P. L. 18[b] (3 Stewart, 2722,)

[23]Brown v. City of Corry, 175 Pa. 528. Possibly "ordinary municipal operations may be carried on, although debts in excess of 2 per centum are thereby created. At all events, if debts are thus created, in excess of 2 per cent, they can be lawfully paid out of the proceeds of bonds, which are issued with the assent of the electors; Roye v. Columbia Borough, 192 Pa. 146.

[24]McKinnon v. Mertz, 225 Pa. 85.

[25]Appeal of City of Erie, 91 Pa. 398.

[b]A similar provision is in the act of April 20th, 1874, which requires the statement to give "the amount of the annual taxes levied and assessed to pay the said indebtedness." Witherop v. Titusville School Board, 7 C.C. 451; Rainsburg v. Fyan 127 Pa. 74.

provides that a municipality may increase its debt, or incur debt, so that the aggregate shall not exceed 2 percentum of the valuation, by a vote of the corporate authorities, duly recorded upon its minutes. It may also issue coupon bonds or other securities therefor. Before issuing[a] any such obligation or security[26] it shall be the duty of the principal officer or officers of the municipality to prepare a statement showing its actual indebtedness, the amount of the last preceding valuation of the taxable property, the amount of debt to be incurred, the form, number and date of maturity of the obligations to be issued. This statement must have appended to it, the oath or affirmation of the officer who makes it. It must be filed in the office of the clerk of the court of quarter sessions. The statement should be filed not merely before issuing the obligations or securities, but before, after offering them to the public, contracting with any one to sell them to him. Hence, if the bonds are offered to the public, before such a statement is filed, and they are sold to R for a price which is above par, the sale will not be obligatory on the city, or, at least if the mayor refuses to sign the bonds, he will not at the instance of R be compelled by mandamus to sign them. The object of the statement is to furnish possible buyers of the bonds full and accurate information in advance of the bidding, of the resources and liabilities of the city.[27] And the school district or other municipality will probably be restrained from carrying out a contract which involves the creation of the debt, e.g. the erection of a school house, and the issue of bonds, if the statement has not been filed.[28] There can, also, be no recovery upon a bond issued by a borough, there having been no state-

[a]The statement does not need to precede the creation of a debt, but only the issue of bonds. Rainsburg v. Tyan, 127 Pa. 74. But Henderson P. J. thought the statement should precede the creation of the debt; Witherop v. School District, 7CC, 451.

[26]In Bank v. Schuylkill County, 190 Pa. 188 it was tacitly assumed that the issue by the county of an unsealed note for $20,000, if it increased the debt would need to be preceded by the filing of the statement. When there was no evidence at the trial on the question of the filing of the statement, there will be no reason for arresting judgment on the verdict against the county. But, in 127 Pa. 74, it is said that the plaintiff in a suit on a bond against a borough must be taken, in the absence of an averment by him to the contrary to have known that the statement had not been filed.

[27]Lyon v. Ripple, 4 Kulp, 59.

[28]Winthrop v. Titusville School Board 7 C.C. 451.

ment filed prior to its issue. If the money obtained on the bond however, was used in discharging a valid debt, the bond-holder can recover the amount paid for the bond and thus used.[29] If bonds are issued, without a statement in the quarter sessions, but for a valid debt, they can be lawfully taken up by bonds or the proceeds of bonds issued later and in compliance with law.[30] If by a bill to enjoin against issue of bonds and to require surrender of any already issued, it appears that the statement has not been filed, and but for this neglect there would be no valid objection to the issue of the bonds the court may give leave to file the statement and, it being filed, may refrain from enjoining.[31]

WHAT THE STATEMENT MUST CONTAIN.

The required constituents of the statement have already been described. One of them is the "actual indebtedness." This should be stated upon knowledge. If stated as a result of guess or manifestly unreliable information, the filing of the statement will not authorize the issue of bonds. A school board by resolution directed its president to file in the office of the clerk of quarter sessions a statement that designated the indebtedness as $9,400. There was indeed no deliberation upon or investigation of the debt. The minutes covering the period during which the debt was claimed to have been made, were not produced at the meeting. They were not in the possession of the board or of any member or official thereof. The averment that the debt was $9,400 was based on the president's assertion, his assertion was founded on the fact that all persons having claims against the school district, having by advertisement been requested to report them, certain claims had been presented which, without investigation, the clerk, the attorney of the board, the tax-collector, the president of the board and another member of it, had in the absence of other members of the board (six in all) and not a regular called meeting thereof, assumed to be correct. No member had actual knowledge that the district had received value

[29]Rainsburg Borough v. Fyan, 127 Pa. 74. He sued for the interest of the bond, only. As the court of quarter sessions has nothing to do concerning the statement, a remonstrance against it filed there, will be stricken off. Laird v. Greensburg, 8 C.C. 621. There is no adjudication upon the statement, the statute authorizes none; Millerstown v. Frederick, 114 Pa. 435.

[30]School District v. Lamprecht Bro. Co. 195 Pa. 504.

[31]Sener v. Ephrata Borough, 176 Pa. 80. There was however another and insuperable obstacle to the issue of the bonds.

for the debt, or how it had been authorized. The president and B. a member, had arived at the amount by conjecture, and the other members accepted this statement. The court enjoined against the issue of the bonds.[32]

UTILITY OF THE STATEMENT.

In Pike County v. Rowland[33] the county had issued bonds, for the raising of money with which to purchase a bridge. They increased the debt beyond 2 per centum, and there had been no vote of the people. It does not appear that a statement had been filed in the office of the clerk of the quarter sessions. The holder of the bonds sued on them for the interest. A point was not improperly refused apparently, by the trial court, to the effect that having been treasurer of the county when the bonds were issued, the plaintiff, who was the person to whom the bonds were first issued, was chargeable with knowledge of the fact that the debt of the county exceeded two per centum of the valuation, and for that reason could not recover.[34] The purchaser of a bond, negotiable in form, is not acquitted of the duty of knowing whether the statement has been filed or not. The omission to file the statement, or its inadequacy, will not estop the county, city, etc. from contesting the validity of the issue of the bonds; on account, e.g. of the absence of a vote of the people.[35] The statement showed the debt, at the time of the issue of the bonds, to be $4,332.74. If this debt existed on January 1st, 1874 the increase of debt later in the same year, did not need a vote of the people; if it was created since January 1st, 1874, the later increase, being in excess of 2 percentum, was invalid without a vote of the people. As the debt stated in the statement was more than 2 per centum, any purchaser of bonds was advised by it that they were invalid, without a popular vote, unless that preexisting debt had arisen before the going into effect of the constitution. The burden is upon the buyer of the bond to inquire as to the popular vote or as to the origin of the debt

[32]Mason v. School District, 10 Kulp, 563. The people who must pay are entitled to know what they are paying for. When the correctness of the statement is attacked by a bill to enjoin against the issue of bonds the burden is on the school directors to support it.

[33]94 Pa. 238.

[34]Millerstown v. Frederick, 114 Pa. 435.

[35]Id.

before or since January 1st, 1874.[36] The statement was required by the act of April 20th, 1874, to show the annual tax levied and assessed to pay the indebtedness. Perhaps, if it averred the levy and assessment of such a tax, a purchaser of a bond could rely on the averment, even although it was untrue.[37] The truth of the averments of the statement may be safely assumed by the purchaser of bonds issued subsequently to the filing of it. The statement, e.g. avering that the tax had been levied for their payment, the issue of bonds could not be assailed as invalid, by showing that in fact no such tax had been levied. "The only purpose" says Stewart P. J., "in requiring a certificate to be filed, is that parties before contracting for such indebtedness may inform themselves as to its regularity. To require them to consult such a notice, invite them to act upon it, and then deny them its protection, by allowing the municipality to assert that the notice was not true in point of fact, would be dishonesty of the rankest kind." The law sets no such traps. The holders of these bonds were held to knowledge of what the statements contained, but beyond that they were not bound to inquire[37]. The statement of a school district setting forth all the statutory requirements, the assessed valuation, the absence of debt, that the proposed debt was $5,000, which was less than 2 percentum; of the valuation, and that an annual tax of 2 mills was assessed for the payment of the debt, in an action on a bond, the school district was estopped from denying that the tax had been duly levied, or from alleging that the debt exceeded $5,000.[38]

WHEN STATEMENT IS UNNECESSARY

When debts are incurred from day to day or week to week which the year's taxes, when collected, will be sufficient to pay, the money with which to pay them may, in the early part of the year, in anticipation of the collection of the tax, be borrowed without the filing of the statement; that is, ordinary expenses of a class which often recurs, may be met by loans made for a short time, which loans will be able to be paid, and it is the intention to pay from the taxes, later collected, of the same year.[39]

[36]Rainsburg Borough v. Fyan, 127 Pa. 74. If the statement makes no averment on the subject, and no provision for the tax was in fact made, the bond would be unenforceable.

[37]Bell v. Waynesborough 195 Pa. 299.

[38]Parker Township School District v. School District, 13 Dist. 769.

[39]Commissioners of Schuylkill Co. v. Snyder, 20 Pa. C. C. 649. An amended statement may be filed; Laird v. Greensburg, 8 C. C. 624

MOOT COURT

PRIM vs. MANLOVE.

Deed—Parol defeasance—Resulting Trust.

STATEMENT OF FACTS.

On May 5th, 1909, Prim borrowed $2,000 from Manlove, on a note for that amount. He at the same time conveyed two farms to Manlove, as he says, as collateral security for the loan; as Manlove says, in payment of a pre-existing debt. With the $2,000 Prim bought a third farm, and caused the conveyance to be made to Manlove. The purpose of this conveyance is alleged by Prim to be to secure the payment of the $2,000 loan; by Manlove to pay with the two other tracts a pre-existing debt. Manlove has had possession of the three tracts, and has sold $2,800 worth of timber from them, $1,200 worth of hay. For some reason, Prim has tendered the $2,000 borrowed, and demanded a conveyance of the three farms. Manlove refusing to convey, Prim files this bill to compel him.

FOLEY for plaintiff.

PARSONS for defendant.

OPINION OF THE COURT.

BRENNAN, J. By the facts of this case it appears that the plaintiff was the owner of two farms situated in Center county. Being desirous of purchasing a third farm, situated in same county, he applied to defendant for the loan of $2,000, executing his promissory note therefor. This money he used in purchasing the third farm. As security for the payment of this loan, Prim alleges that he has conveyed the two farms mentioned, by deeds absolute on their face, to Manlove, and at the same time has had the deed for the third farm executed in the name of Manlove. Prim contends at the time these conveyances were made, it was orally agreed between him and Manlove, that upon the payment of the note he, Manlove, should reconvey to him, or to any person he might designate.

Manlove, in his answer to the bill denies that he entered into any agreement with Prim as to the reconveyance of the property in question. He contends that at the time the conveyances were made, Prim owed him $6,000 and that he believed the conveyances were made in settlement of this debt.

It is made to appear from the statement of this case, that both the testimony of plaintiff and defendant, is all corroborated.

Plaintiff in this case files this bill for an accounting and for a decree compelling Manlove to reconvey the property to him, Prim contending, inter alia, that as to the first two properties Manlove should be deemed a trustee ex-malificio, and as to the third farm, that there is a resulting trust in favor of plaintiff.

In the case of Grove v. Kase, 195 Pa. 325, which we deem a case on all forms with the case at bar, the facts were as follows: The plainitff,

a brother of defendant, conveyed by deed absolute on its face, all right title and interest in certain real estate of which he was the owner, to defendant. By an alleged parol agreement it was agreed that defendant should hold the land in question until she should pay herself a certain debt owing to her from plaintiff, from the royalties of the land conveyed, after which she was to reconvey to plaintiff, which she refused to do, whereupon plaintiff filed a bill in equity for an accounting and reconveyance. Held: That plaintiff was not entitled to recover.

In the case at bar the facts are identical with those of the case above cited.

The statement of facts does not set forth that such an agreement as plaintiff avers was, or was not, actually made; for the present, we shall assume plaintiff's allegations correctly state the facts. The legal question, therefore, is, whether upon such an agreement the plaintiff can successfully rest his prayer for a decree.

There are two aspects in which the transactions may be regarded, First: the deed may be really a mortgage, the defeasance being in parol. This is the natural conclusion; indeed, it is difficult to avoid the decision that the transaction could be of no other character.

In order to secure defendant for the payment of a certain sum of money, plaintiff made a conveyance of real estate by deeds absolute on its face, but qualified by parol agreement that after defendant should be paid from the sale of the timber on the land, the land should be reconveyed. In our opinion this was a pledge of real estate to secure the payment of money and the discharge of a pecuniary obligation, and was so clearly a mortgage that a discussion is likely to obscure the conclusion. If it was a mortgage the act of 1881 P. L. 84 lies equally in Plaintiff's road to relief. It provides expressly "that no defeasance to any deed for real estate regular and absolute upon its face, made after the passage of this act, shall have the effect of reducing it to a mortgage, unless the said defeasance is made at the time the deed is made, and is in writing, signed, sealed, and acknowledged, and delivered by grantee to grantor and is recorded within 60 days from the execution thereof."

All the requirements set forth by the act must be strictly complied with to give the defeasance validity. Sankey v. Hawley, 118 Pa. 30; Molly v. Ulrich 133 Pa. 41.

The plaintiff in this case has failed to comply with any of the provisions of said act, and for that reason no validity can be given to the parol defeasance.

The other aspect in which the agreement may be considered is urged by the complainant. He insists that the parole contract to reconvey imposes a trust ex maleficio upon the transaction, which should now be enforced by a decree for account and reconveyance.

Unfortunately for this position it has been expressly decided in numerous cases that the breach of a parol contract is not of itself sufficient to warrant a court in fastening a trust ex maleficio upon the original conveyance. There must be proof of fraud at the time the deed was executed—of fraud inducing and influencing the grantor to part with his title—otherwise such a trust cannot arise. Salter v. Bird 103 Pa. 436; Barry v. Hill, 166 Pa. 344; Martin v. Baird, 175 Pa. 540. In the case at

bar we find at the most, nothing more than the breach of a parol agreement. In the case cited by complainant, Goodwin v. McMinn 193 Pa. 646, it was proven that there was a fraud practiced with plaintiff from the beginning of the transaction. In the present controversy, fraud is not alleged nor is it proven that defendant secured the transfer through fraud. We therefore find as a fact that defendant was guilty of no fraud in securing the transfer by deed. The case relied upon by comcomplainant and the present case, differ in this one very important element, and for that reason the case cited can have no effect in our decision of the present case.

This finding of fact, viz., the absence of fraud, in connection with the rule of law above referred to, is conclusive against Prim's right, for the assumed agreement (even if actually made) would not without proof of fraud support the decree now asked. Besides, the alleged agreement is not proven by the evidence of the necessary quality. The rule upon this subject is well settled. Before upon a deed absolute on its face can be imposed a parol trust ex maleficio, the evidence must be clear, precise, and indubitable, and must proceed from at least two witnesses or one with corroboratiug circumstances. Wallace v. Smith, 155 Pa. 78. Burr vs. Kase 168 Pa. 81. In this case it appears the testimony of both plaintiff and defendant was corroborated. Therefore we are of the opinion that the plaintiff has not made out his case as required by the above stated positive rule of law. That in fact no parol agreement was proved.

If the parol agreement was made as averred by plaintiff, either the transaction was a mortgage, and in this event the parol defeasance cannot be enforced because it violates the act of 1881, or the agreement created a trust by parol and in this event the trust cannot be enforced because it violates the act of 1856 P. L. 533 sec. 4, which provides that all declarations of trust in land shall be in writing. (2) No trust ex maleficio has been shown to exist.

In order to establish a trust ex maleficio the fraud must be in the transaction from the beginning. It is true it may be shown by subsequent acts; but we find no such act of defendant as would sustain the inference, that at the time of the conveyance defendant possessed a fraudulent intention.

The foregoing discussion applies to the first two parcels of land conveyed. We come now to consider the effect of the third conveyance, viz: the taking of the title in the name of Manlove, when the purchase price was paid by Prim with money borrowed from Manlove.

Where one borrows money from another, and pays it on articles for the purchase of lands, and the title to the land is taken in the name of the lender of the money to secure the money borrowed, the money is that of the borrower and there is a resulting trust in his favor in the lender. Howe v. Bates 21 Pa., C.C. 570; P. & L. Dig. Decisions Col. 38049.

In ths case of McDonough v. McNeill 113 Mass. 92, Chief Justice Gray says: "Where land conveyed by one person to another is paid for by the money of a third, a trust results to the latter by implication of law, which is not within the statute of Frauds." It is sufficient if the

purchase money was lent to him by the grantee, provided the loan was clearly proved. Jackson v. Stevens 112 Mass 96.

Where the purchase price is paid by one and title taken in the name of another, a trust results in favor of the one paying the money. Bispham's Equity, page 80.

Therefore, in consideration of the foregoing principles of law and authorities cited and in order that the equities of the case be worked out, it is decreed: That as to the first two parcels of land no recovery can be had, as the transaction violates the act of 1881. Secondly; That Manlove, the delendant is hereby declared to be a trustee of the third piece of land, as trustee in a resulting trust in favor of Prim who paid the purchase price, also that Manlove account for same.

Decree entered accordingly.

OPINION OF SUPREME COURT.

The evidence tendered by the plaintiff, if not qualified by that of the defendant, would show that Prim bought a farm and paid $2,000 for it. Although he had obtained the money as a loan, from Manlove, it was his money. He had become owner of it by giving a promissory note for it. The conveyance was however made to Manlove. From these facts a trust would result to Prim.

It would be competent for Manlove to rebut the trust by showing that the parties intended that no trust should arise: that, for instance, Prim intended to make a gift of the land, or that he intended to pay by it a debt which he owed to Manlove, or that he intended the land to be held by Manlove as security for the repayment of money borrowed.

Apparently, Manlove's evidence tends to show that the conveyance was made to him as payment of a pre-existing debt. The learned court below has not credited it, and we cannot say that it has therein committed an error.

The plaintiff might have relied on the presumption of a trust. He however has not chosen to do so. He repudiates the hypothesis that the land was conveyed to Manlove under such circumstances that Manlove holds the land as a trustee for him. He admits that it was intended to be beneficial to Manlove, to be a security for money borrowed from Manlove. We do not see how the resulting trust being thus repudiated by the alleged *cestui que trust* we can affirm its existence.

What Prim avers is that he directed his vendor to make the conveyance of the tract to Manlove, as security for the loan. Had the vendor conveyed to Prim, and had Prim then conveyed to Manlove the transaction would have been equivalent to the direct conveyance at Prim's instance, by the vendor to Manlove. We think that whatever would make unassertable the reception by Manlove of the land as collateral security, had it been conveyed to him by Prim, ought to prevent the assertion that he received it from Prim's vendor as such security.

The act of June 8th, 1881, amended by that of April 23d, 1909, P.L. 137, provides that "No defeasance to any deed for real estate, regular and absolute upon the face, made after the passage of this act, shall have the effect of reducing it to a mortgage, unless the said defeasance is in writing, signed and delivered by the grantee in the deed to the grantor."

The object of the statute was to prevent the fraudulent setting up of defeasances, with the effect of impairing the apparent absolute titles of grantees. Although like the statute of frauds it may itself be the cause of frightful frauds it is to be hoped that it will prevent more frauds than it occasions. Whether it will or not, we cannot know. Its predecessor, the act of 1881, has been carried out by the courts, despite the probably villainous use of it by grantees, in some cases. Sankey v. Hawley 118 Pa. 30; Cf. Molly v. Ulrich, 133 Pa. 41; Grove v. Kase, 195 Pa. 325; Sterck v. Germantown Co. 27 Super 336; O'Connor v. Decker, 30 Super, 579; Lohrer v. Russell, 207 Pa. 105; Guaranty Co v. Linton, 213 Pa. 105. The act of 1909 is an improvement upon that of 1881. It does not require the defeasance to be sealed or to be made simultaneously with the delivery of the deed, absurd and shocking requirements of the act of 1881. It no longer requires, in order to bind the grantee, (as distinguished from his subsequent grantee or mortgagee, who has no notice of the defeasance) that the defeasance should be acknowledged and recorded; nor, even in order to bind the grantee's grantee, that it should be acknowledged at the time of delivery and recorded within 60 days thereafter. The act of 1909 however is as peremptory as that of 1881, with respect to the necessity that the defeasance should, at some time, be written and signed by the grantee.

The learned court below has correctly decided that the act of 1909 makes unenforceable, the alleged parol defeasance to the conveyance made directly by Prim to Manlove.

It has skillfully and benevolently sought to enable the plaintiff to recover the tract which was conveyed by Prim's vendor to Manlove. In view of the ability of the opinion, we regret our being unable to follow it. The plaintiff, as it seems to us, rejects the theory of a resulting trust, and asserts that of a mortgage. His evidence tends to show, and but for the act of 1909 would be sufficient to show, that the tract was conveyed to Manlove primarily to secure the repayment of a loan. Finding the legal obstacle to the enforcement of his right of defeasance, under this view, it is not legitimate for the court to make a case for Prim different from that which his evidence tends to support and different, also, from that which the defendant's tends to support.

It is necessary to modify the decree of the learned court below, and to direct the dismissal of the bill in toto.

Decree reversed and bill dismissed.

SAXTON V. AMES, EXECUTOR OF SCARLETT

Assumpsit for Attorney's Fees for Defending an Action Against the Executor for a Debt of the Estate.

STATEMENT OF FACTS.

An alleged creditor of Scarlett sued Ames, as executor, for the debt $3,000. Ames employed Saxton as attorney to defend him. The effect of the defense was to reduce the claim received to $450. Saxton demanded $800 compensation, and the evidence indicated that this was a

reasonable fee. Ames has been discharged as a bankrupt, Saxton's claim, if he had any against him, having been provable against his estate. This is a suit against the estate.

DIPPLE, for plaintiff.

STRAUSS, for defendant.

OPINION OF THE COURT.

PARSONS, J.—There are two questions involved in this case: (1) Whether the plaintiff, Saxton, can recover from the estate of Scarlett, or (2) whether he must bring his action against the executor, Ames, the man who personally employed him.

The general duties of an executor or administrator as defined by the American and English Encyclopedia of Law, are "to bury the decedent, collect his effects, preserve them from waste, pay claims against the estate, and distribute the residue, if any, among those entitled, and to do all the things necessary as the representative of the personal estate of the decedent."

As the facts, stated above, are given, it is plain that the act of Ames, as executor of Scarlett, in employing Saxton, was, not for the mere help or benefit it would give him, but for the express benefit to the estate that Ames was executor of. The reducing of the alleged creditor of Scarlett's claim from $3,000 to $450, was of no benefit, either directly or indirectly to Ames, but it was of great benefit to the estate. Thus we see that the services, as shown by the complaint, to be ultimately and wholly for the estate, and in no manner for his benefit personally. Conceding that the foregoing is true, the question now for us to decide is, who is responsible for the attorney's fees, the estate of Scarlett, or Ames as executor of Scarlett? In looking over this question, we have found that the weight of authority seems to rest to the latter, namely, that the executor or administrator of an estate is liable for all debts contracted by or for the estate, and to narrow this statement down to the collection of attorney's fees, we have found that the weight of authority seems to rest the same way.

First, let us take into consideration the authorities holding that the administrator and executor of an estate are personally liable for all debts contracted for or by the estate. We find that in 57 Cal. 238, 38 Cal. 85, 47 N. Y. 360, 105 N. Y. 488, and 45 N. Y. 306, that the authority of a personal representative to employ such persons as it may seem necessary for him to employ, to enable him to perform his duties to the estate which he represents and to pay for their services out of the funds of the estate in his hands, is undoubted, but it is generally held that such a contract of employment does not create any obligation on the estate, and that the only remedy of the person employed is against the personal representative individually. This principle is applicable to the employment of attorneys and counsels also; and in 57 Cal. 238 and 2 Robt. (N. Y.) 385, the courts held that "an attorney employed by the administrator of an estate has no claim against the estate, although his services may have enured to the benefit of the estate. He must look for compensation to the administrator who employed him." Likewise, in 41 N. Y. 315 the

court holds: "It is well settled that executors who employ attorneys in respect to the affairs of their estates are personally liable for such services and cannot be made liable in their representative capacity. Claims for such services therefore are not claims against the estate, but claims against the executor personally."

The rule is well settled that an executory contract of an executor or administrator if made on a new and independent consideration, moving between the promisee and executor or administrator as promisor is his personal contract, and does not, in the absence of authority given by statute or by the will of the decedent, bind the estate, though the consideration moving for the promisee is such that the executor or administrator could properly have paid for the assets and been allowed for in settlement of his accounts.—8 S. & R. 462, 14 Pa. 352, 20 Pa. 214, 12 Phila. 231. So inflexible is the rule, denying to personal representatives the power to bind by an original contract the estate committed to their charge, that its application is not affected by the fact that the contract was made, or the debt incurred, for the benefit of the estate.—American and English Encyclopedia of Law, Vol. II, page 935, section 15.

The above is undoubtedly the law in Pennsylvania, so far as contracts made with third parties and for attorneys. The contract in question is not an executory contract, or one which requires something to be done in the future; but this contract has been executed, and for its execution the attorney, Saxton, claims his fee of $800. In examining the cases as cited above, we find that the contracts made by the executors and administrators were made with third persons, and made for the benefit of the estates, but none of the cases, so far as we recall, are similar in any respect to the case at bar. In these cases the executors and administrators contracted with creditors and third persons, but in no case were the contracts made with attorneys, and this fact, in our opinion, puts a different phase on the question.

In Arkansas a personal representative is authorized by statute to employ counsel in certain cases by leave of court, and the statute provides that "when it shall become necessary in the opinion of the court for an executor or administrator to employ an attorney to prosecute any suit brought by or against such executor or administrator, the attorney's fees shall be paid as expenses of the administrator."—35 Ark. 267; American and English Encyclopedia of Law, Vol. II, page 936, note 2.

These principles, as to the employment of attorneys and counsel by the executors and administrators of estates and their compensation, are not all uniform in denying to the executor and administrator the power to bind the estate by such contract of employment, as they are in regard to other classes of employment, and through our examination of the different cases we are of the opinion that the state of Pennsylvania is one of the exceptions in regard to this.

In deciding this question, the court has been influenced, not alone by the equity of this case, but mainly through the decision found in P. & L. Digest of Decision under the head of "Attorney's Fees." There a review of the cases show that an attorney may look to the estate for his compensation, and consequently, taking into consideration these decisions and an examination of them, we must decide accordingly.

In an accounting to the Orphans' Court, the administrator of an estate claimed credit for fees paid an attorney, who was employed by him for matters connected with the estate. This claim was opposed by a creditor, but the court allowed the claim.—Lafferty's Estate, 23 Pitts. L. J., 157. In 5 Kulp 17 (Francis' Estate), an attorney employed by all the heirs of a decedent but one, to prosecute the administratrlx for an account and distribution, filed a bill for compensation out of the estate. The charge was allowed by the auditor and exception taken, but the court confirmed the report. In 6 Pa. C. C. 159, the court held that "an attorney-at-law is entitled to compensation out of the estate of a lunatic, for services for the benefit of the estate." In Scott's Estate, 9 W. & S. 98, the Supreme Court said in this case: "It is not doubted that the fee paid to counsel was a reasonable and proper compensation, and the question is whether the executor or the Charity shall bear the charge of it. An executor is bound to prove the will and certainly not at his own expense. When he meets with obstruction it is his duty to remove it, if he can, and he is unfaithful when he omits to attempt it. The executor litigated not for his own interest but for the interest of the party who got the whole estate by the litigation, and now refuses to reimburse him his expenses." What the Supreme Court said of the above case, we can say of the present case at bar.

Vol. 1 of Browne's "The Law of Decedents' Estates in Pennsylvania."—Where an estate is so situated, that legal advice is requisite to direct the course of the executor, or where they must bring or defend suits, counsel must be employed, and the estate must pay their fees if reasonable.

When fixing the allowance of counsel fees for an executor, regard should be had to the labor and services performed, and the advantage to the estate. The sum involved and the value of the estate should be considered. In the present case, regard has been had to the labor done and services performed, and the advantage to the estate, and according to the evidence, the compensation of $800, demanded by Saxton, was a reasonable fee. Ames has been discharged as a bankrupt, and if Saxton was a creditor of Ames, he could take pro-ratably with the other creditors of Ames; but he is not a creditor of Ames, but a creditor of the estate for which Ames is executor. Therefore, if a decedent's estate receives the benefit of an attorney's services with the approval of the executor, a reasonable compensation will be allowed the attorney out of the estate.

Judgment accordingly.

OPINION OF SUPERIOR COURT.

The question before us is not whether the executor can create a liability of the estate for attorney's fees. He may employ an attorney when such employment is necessary, and paying him a reasonable fee, may demand credit for the payment, when he settles his account.—Ammon's Appeal, 31 Pa. 311; Groff's Estate, 215 Pa. 586, and many other cases.

When an attorney renders proper service to the estate, at the instance of the executor, he may, as creditor, *in propria persona*

and not merely through the executor, claim payment in the Orphans' Court, citing the executor to file his account; Wilson's Appeal, 3 Walker 216, and directly sharing in the fund shown by the account to be in the executor's hands. — Wilson's Appeal, *supra,* Shoenberger's Estate, 211 Pa. 99; Cook's Estate, 1 Phila. 408. Cf. Webb's Estate, 33 Super 41.

The question is whether a contract made by the executor with an attorney, in behalf of the estate, will support an action at law against the executor, as such, an action eventuating in a judgment *de bonis testatoris.* In an early case so able a judge as Tilghman, C. J., laid down the principle that "in all cases of promises, express or implied, made to or by, an administrator, after the death of the intestate, the action lies for or against the administrator personally."—Grier v. Huston, 8 S. & R. 402. Money or property may be properly procured, sometimes, by the executor for the benefit of the estate, but a note given by him for the money borrowed, or for the price of the property, will be his personal note, and only he, as an individual, can be sued upon it.—Orne v. Ritchie, 12 Phila. 231; Williamson's Appeal, 94 Pa. 231; Farmers' Nat. Bank v. Griel, 12 Lanc. 28; also 21 Lanc. 170. The doubt upon this point expressed by Rogers, J., in Seip v. Darrach, 14 Pa. 352, must be attributed to a transient lapse of the judicial thinking power.

There is no material difference between beneficially procuring money or other property and beneficially procuring services for the estate. The former is useful; so is the latter. The former is worth money; so is the latter. Saxton's skill and labor have possibly saved the estate $2,550. The Orphans' Court might find them worth $800, and allow that amount to Saxton even if the executor did not ask credit for it.—Schoenberger's Estate, 211 Pa. 99. It might also, not finding the service worth $800, allow less, while Saxton could nevertheless recover $800 upon his contract with the executor as an individual.

The impossibility of collecting $800 from the executor, as a man, because of his bankruptcy, cannot create a right to sue him as executor. The Orphans' Court is open to him for a claim against the estate, but from that circumstance cannot be inferred that the Common Pleas is open to him.

The allowance of a suit in either court, upon debts created by the deceased himself, leads occasionally to incongruities. It cannot be said to be unreasonable to limit to one of these courts the pursuit of claims springing into existence since the death of the testator, by the act of the executor. So far as Saxton has Ames' personal contract to pay him $800, or Ames' personal contract that the estate shall pay him $800, he may sue Ames in the Common Pleas. If he desires to enforce a liability of the estate, thus created by Ames, he has a sufficient opportunity to do so in the Orphans' Court.

A note for the fee, though signed by Ames as executor, would have been treated as his personal note.—Geyer v. Smith, 1 Dall. 347; Claghorn's Estate, 181 Pa. 610.

The plaintiff might have amended his action and declaration by striking out all words indicating that he was suing the executor, as such, with a view to recovering a judgment *de bonis testatoris.* He has not done so.

The able and carefully written opinion of the learned Court below leaves us unconvinced that the action can be sustained.

Judgment reversed.

COMMONWEALTH V. SMITHSON.

Manslaughter— Officer Killed While Attempting Illegally to Arrest Defendant.

STATEMENT OF FACTS.

Garnett, a police officer, attempted to arrest Smithson illegally. Smithson attempted to run away, and Garnett drew his pistol, aimed it at Smithson and told him that if he did not halt he would kill him. Smithson did not stop but drew his pistol and killed Garnett.

CONWAY, for Commonwealth.

STAFFORD, for defendant.

OPINION OF THE COURT.

R. B. SMITH, J.—The counsel for the prisoner in the case at hand claims him to be guilty of nothing more or less than excusable homicide. Or, in other words, the prisoner has committed no crime at all. An excusable homicide means the killing of a human being, either by misadventure or in self-defense. The prisoner certainly did not kill Garnett by misadventure, that is, by an accident.

The question then is: did Smithson kill Garnett in self-defense? Self-defense is the protection of one's person and property. A man may defend himself when attacked, repel force by force, and even commit a homicide in resisting an attempted felony. Conceding for the present that the prisoner did kill Garnett in self-defense, we will look at the law on this point.

It has been held in this state in 160 Pa. 451 and 209 Pa. 274, that homicide committed in self-defense is excusable; but to justify homicide in self-defense there must not only be active, imminent peril of life or great bodily harm, or a reasonable belief of such peril founded on facts as they appear at the time, but also *no other means of escape*. In the case at hand, did the prisoner use up every possible means of escape? No, it cannot be said that he did; and he was, at time of commission of the crime, attempting to escape being placed under illegal arrest, or Garnett would not have drawn his pistol. It has been held in various cases that the accused must have acted as an ordinarily cautious and courageous man would have acted; or, in other words, there must have been a reasonable appearance of danger, or reasonable grounds to believe there was danger.—101 Pa. 332.

Clark (page 181) on Criminal Law, states: "A person must not be guilty of negligence in coming to the conclusion that he was in danger. Under such circumstances the homicide will be manslaughter." We think the rule as stated by court in 44 Alabama 41, "That a person should submit to an illegal arrest and afterwards seek redress from a court of law," fits the present case. Measuring by above-stated rule, and other authorities cited, we think that prisoner showed negligence in killing Garnett, and in doing so did not act in self-defense.

The question that next presents itself, after disposing of the question of self-defense is: What is the prisoner guilty of?

Trickett, in Pennsylvania Criminal Law, Vol. II, page 858, states

that "the arrest of an innocent man for a crime without warrant is a great provocation. If in frenzy of passion he loses his self-control and kills his assailant, his homicide will be but manslaughter." Manslaughter is the unlawful killing of a human being without malice, express or implied.

In Commonwealth v. Salyard, 158 Pa. 501, the Court, in affirming a point of the prisoner, stated. "It not having been shown that Martin (deceased officer) had a warrant of arrest for prisoner, and not having been alleged or proven that prisoner was, at time of the killing, in act of commission of any felony, . . if the jury believe from evidence in case that killing was done in resisting arrest, then, in absence of all other evidence of circumstances attending the killing, they would not be justified in finding a higher grade than of manslaughter." In this case it seems there had been attempted illegal arrest.

In case at bar we do not believe that prisoner knew that arrest was anything else but illegal, for if he did, the crime would be murder. For in such a case the accused would not, knowing the arrest to be legal, have any provocation to kill.—Graham v. State, 28 Texas App. 582. From the law within stated and cited, the court finds that the prisoner may properly be convicted of manslaughter.

OPINION OF SUPREME COURT.

The Court below has properly held that the killing of Garnett could not be justified by the plea of self-defense. Smithson was threatened with arrest, detention for a comparatively short time, and a public examination before a justice of the peace. That Smithson apprehended, or had reason to apprehend, anything worse, does not appear. In order to avoid these slight inconveniences and annoyances, he has intentionally killed Garnett. Human life is not of so little account that for these reasons it can lawfully be extinguished.

The trial court has magnanimously shielded Smithson from conviction of murder, by instructing the jury that the utmost crime of which he could be found guilty was voluntary manslaughter. A conviction for voluntary manslaughter has followed, and the defendant appeals. The authorities sanction the view that "a homicide committed in resisting unlawful arrest is manslaughter and not murder."—McLean, 1 Crim. Law, 309; 1 Wharton, Crim. Law, p. 412; 2 Bishop, Crim. Law, p. 399. The defendant cannot successfully complain that he has been convicted of manslaughter.

But, had it an appeal, might not the Commonwealth complain of the instruction of the trial court? An intentional killing becomes, when not in self-defense, less than murder only when it follows upon "a provocation" which engenders "heat of blood," "sudden passion," "sudden transport of passion," "a state of rage or passion," "a sudden heat and passion."—Brooks v. Commonwealth, 61 Pa. 353; 2 Trickett, Crimes, p. 869. The evidence is entirelybare of intimation that the state of mind thus described, existed in Smithson when he perpetrated the killing of Garnett. In Brooks v. Commonwealth, Agnew, J., remarked: "But if the arrest were illegal, it does not follow that the crime was necessarily manslaughter. There remained still the question on the

evidence, whether the killing was without malice and arose solely from a sudden heat and passion upon the illegal arrest." He observes on the case before him, "The killing was evidently not the result of anger and hot blood, growing out of an unwarranted assault on the persons of the prisoners. It was prompted by wickedness of heart and a consciousness of guilt," etc.

The text writers cited *supra* recognize that even one unlawfully arrested may slay the arresting person maliciously and thus commit murder. "Where no adequate provocation exists, or where no passion or heat of blood results, the wilful slayer cannot extenuate his cool and deliberate act of killing by the pretense that he had a right to be in a passion."—Dalvin v. State, 6 Coldw. 283 (Tenn.) Cf. Noles v. State, 26 Ala. 31, where a conviction of murder in the first degree, of one who killed the person who attempted to arrest him, was sustained. See, also, Rafferty v, People, 69 Ill. 111; 72 Ill. 37. The absence of evidence of passion, other than that of the murderous act of the defendant, might have justified a finding that the act was malicious; was murder of the first degree.

When a policeman arrests a man, he has reason to suspect that the policeman believes himself entitled to arrest him; that he is acting in good faith; and that, if the arrest is improperly made, that fact will soon be discovered and he set at liberty. The law gives him remedies for any wrong done him; an action for assault and battery; an action for false arrest, etc. We fail to see how mere arrest can engender in a normal mind that wonderful thing called "heat of blood," etc. It is more likely in normal men to awaken mortification and humiliation; in the atrocious and unsocial mind, revenge, desire to exterminate. The prisoner is probably a person of exaggerated self-appreciation, feeling that an arrest is a species of *lese-majesty*, worthy of instant and condign punishment, and this state of mind we shall find it extremely difficult to discriminate from malice, hate, readiness for a slight humiliation even innocently imposed, to destroy life.

Garnett showed a purpose to complete his arrest. He may have believed a felony committed, and Smithson the felon. He gave Smithson the option to submit or to die. We find nothing in this stern resolution of the deceased to justify or even to mitigate the homicide. It still remains true that Smithson could have submitted to the arrest, at the small cost of a transient inconvenience, and rather than do this, was willing to destroy Garnett's life.

Judgment affirmed.

PHILLIPS V. JAMISON

Ejectment—Covenant of General Warranty—Adverse Possession by Grantor

STATEMENT OF FACTS

Jamison conveyed land in 1880 to Phillips with deed of general warranty. The next year Jamison took possession of the land without Phillip's knowledge and has retained it ever since, intending to hold it as his own, if he were not dispossessed within 21 years. In this ejectment brought in 1909, Jamison sets up the Statute of Limitations—Phillips asserts, that his warranty precludes his availing himself of an after acquired title.

HICKS, for Plaintiff.

JACKSON, for defendant.

OPINION OF THE COURT.

SMITH, J.—Thirty years ago from the beginning of this action Jamison conveyed land to Phillips with deed of general warrenty but the next year took possession of the land without the knowledge of Phillips. Since which time he has retained possession, intending to hold it as his own if not dispossessed within twenty-one years. Has there been the adverse possession required by the Statute of Limitations, and if so, is or is not Jamison, because of his general warranty deed, estopped from setting up the Statute?

It does not appear that Jamison went in under any color of title, but this is not necessary to establish adverse possession for where there is an actual possession and an intention to hold adversely the possession need not be under color of title in order that the Statute should operate.—Overfield v. Christie, 7 S. & R. 17; Munshower v. Patton, 10 S. & R. 334.

It appears that Jamison entered and held possession without the knowledge of Phillips but knowledge by the true owner of the adverse entry is not essential in order to make the possession adverse.—Lodge v. Patterson, 3 Watts 74.

That there has been an adverse possession is conceded by the counsel for the plaintiff but his argument is to the effect that the general warranty embraces the covenant for quiet enjoyment and that defendant's possession is an interference with quiet enjoyment, that the plaintiff's actions impeach his deed, and that such is the relation existing between them that the claim he now asserts is inequitable.

The general warranty covenant may be termed the Sweeping Covenant. As a rule it is so worded as to obligate the grantor to "Warrant and defend the granted premises against the claims of all persons whatsoever." It is the oldest of all covenants and existed before written deeds, and it was the only covenant that the feudal lord made with his men. If the title to the land failed, the lord was obliged to give his man an equal quantity of land of the same value. It followed that if any one claimed the land against the tenant, it was the duty of the tenant to notify the lord so that he might come in and defend.

The general warranty covenant is a covenant for quiet enjoyment and something more. It is a covenant to defend both the premises and the estate in the land. It gives the grantee the right to call on the grantor to make such defense in case of an adverse claim. If the title is not perfect and it is possible for the covenantor to make it so afterwards, he will make it perfect. If he obtains or can obtain any outstanding title, he agrees to procure that title and convey it to the garantee. It follows that if the covenantor becomes possessed afterwards of a certain interest he will not be allowed to show that he in fact did not at the time have such interest but such interest will be regarded as being held in trust for the grantee.

"While the continued possession of land by the grantor thereof after the execution of a deed is presumed in the absence of any showing to the contrary to be in subordination to the title of the grantee, it is none the less true that the conveyance does not of itself prevent the grantor from acquiring title by adverse possession against the grantee."—Cyc. of Law, Col. 1040; Watson v. Gregg, 10 Watts 289. "There is nothing in the relation of the vendor and vendee by deed executed and not executory which will prevent the vendee who may remain in possession, or who may afterwards take possession, from claiming adversely and relying on the Statute of Limitations."—Cyc. of Law, Col. 1040; Watson v. Gregg 10 Watts 289. "The covenant of warranty contained in the deed will not defeat title by limitations acquired after the deed. Such title is no breach of covenant which cannot be extended to cover future laches of the grantee whereby he loses the title conveyed to him.—Cyc. of Law, Col. 1040; 9 Cush. 497.

From the law just quoted we can readily see that there are some circumstances under which the grantee can be disseized by his own grantor as well as by a third person. A grantor may, through acts, divesting the grantee of his interest in the premises, come into possession of title again. In the case at bar full effect is given to the deed to Phillips, and Jamison would be held estopped from setting up any title as then held adversely; but by his own acts Phillips has allowed a perfectly good title to lapse and it is no answer to the alleged disseissen that Jamison previous to his entry and commencement of adverse possession fully acknowledged the title of Phillips. Jamison was a mere trespasser and no fiduciary relation existed.

OPINION OF SUPERIOR COURT

There are many cases which state generally that there is nothing in the relation of grantor and grantee which will prevent the grantor from subsequently acquiring title by adverse possession.—Watson v. Gregg, 10 Watts 289; Olwine v. Holman, 23 Pa. 279;, Inglis v. Inglis 159 Pa. 401; Buckholder v. Seyler' 7 W. and S. 154; 1 Cyc. 1039; where cases are collected.

In a number of these cases there is nothing to show whether the grantor's deed was a warranty deed or not, but whenever the question was raised it was uniformly held that a grantor in a warranty deed may by adverse possession subsequently initiated acquire title to the premises

even as against the grantee or his privees.—See 23. L. R. A. N. S. 129 where the authorities are collected. This is the rule in Pennsylvania. "The statute makes no exception of a vendor in a deed of warranty." "The doctrine that a grantor with warranty may originate a possession adverse to his grantee is well established." Milnes v. Vangilder, 197 Pa. 347; Connor v. Bell, 152 Pa. 447.

The rule that any title afterwards acquired by a grantor in a warranty deed, insures to the benefit of his grantee is applicable only to titles existing and outstanding at the time of the deed, and does not extend to titles subsequently originating either by the grantee's acts or his laches.—Cyc. 1040.

The sole remaining question is whether the possession of Jamison was adverse. It is well settled that "a vendor after a conveyance and before delivery of possession is to be regarded as a trustee for the vendee so far as regards the possession" and that "if he wishes to change the character of his possession he must manifest his intention by some act of hostility to the vendee, plainly indicating his intention to deny his right and to hold adversely to it."—Olwine v. Holman, 23 Pa. 279; Conor v. Bell, 152 Pa. 448; Ingles v. Ingles, 150 Pa. 397; Milnes v. Vangilder, 197 Pa. 347.

The doctrine of these cases is not, however, applicable to the present case. The grantor in the present case did not retain possession but took possession a year after the conveyance "intending to hold the property as his own." There was nothing to warrant the presumption that he entered under the grantee or as a trustee for him. It was not his business or duty to enter and keep possession for the grantee. He was in no relation to the grantee that implied any confidence or trust. He entered the land intending to hold it as his own and the effect of his entry was the same as if the entry had been made by a third person.—See Watson v. Gregg, 10 Watts 293. So considered, the opinion of the learned court below shows that it was sufficient to initiate a title by adverse possession.

In Watson v. Gregg, 10 Watts 289, it appeared that a vendor after a conveyance in fee entered upon the land. In a suit in which the vendor attempted to set up a title by adverse possession the court held, "The entry of the vendor must be taken to have been adverse to the title of the vendees in absence of any evidence that he entered for them or held under them."

In Pipher v. Lodge, 16 S. and R. 234, in which persons claiming under the vendor set up title by adverse possession the court said: "Viewing all the circumstances of that entry by the grantor and the subsequent possession of himself and his devisees, if all these matters do not amount to an actual ouster but only to what is called a trust, a mere trust unprotected by any length of possession or by the act of limitations, then there can be no circumstances under which the statute can with certainty be said to protect any possession."

Judgment affirmed.

WM. MAPLE V. BOROUGH OF OXFORD

Trespass for Personal Injuries—Contributory Negligence.

STATEMENT OF FACTS.

The borongh was causing water pipes to be laid in street A. which was excavated. Barriers were put across the road, at a distance of twelve (12) feet from the excavation, but no lights indicated the barriers. On a dark night Maple was riding in an automobile, belonging to his friend who was operating it. It was going at the rate of ten (10) miles an hour. The barriers not being seen, there being no lights on the vehicle, the automobile ran into it, and pushed it for twelve feet, before the vehicle could be stopped. It ran into the excavation, was overturned, and Maple was injured. He sues the borough for damages, $400 for injuries, because of the negligence of the borough.

BRENNAN for Plaintiff.

HANKEE for Defendant.

OPINION OF THE COURT.

FOLEY, J.—To the court, the facts here presented set forth a clear case, the question being whether, Mr. Maple was guilty of contributory negligence, that negligence which co-operates in causing the injury and which bars a recovery for the injury. The rule is laid down by Justice Hand in 122 Pa. 463, to the effect that *any degree* of negligence on the part of the plaintiff contributing to the injury, destroys his right to recover. It is the kind of action, not the quality on the part of the plaintiff which prevents the law from measuring between plaintiff and defendant their respective degrees of negligence, when the former comes into a court of justice. We also have the legal principle, that contributory negligence will defeat recovery even though the negligent act consisted in the violation of a statute or ordinance.

With the above principles in mind, we read the act of April, 1903, Section 5, which provides: "No person or persons shall be allowed to use, operate, or drive any motor vehicle as aforesaid upon any of the public highways of the cities, boroughs, counties, or townships of the commonwealth at a greater speed than eight (8) miles an hour within the corporate limits of any of the cities or boroughs, etc." Section 8 reads: "Every such automobile shall carry during the period from one (1) hour after sunset, to one (1) hour before sunrise, at least two lighted lamps, showing white lights visible at least 100 ft. in the direction towards which such automobile is proceeding and shall also exhibit one light visible in the reverse direction." We have here an automobile being used by Mr. Maple in the words of the statute. We also have here an automobile being used by Mr. Maple without any lights, and going at an excessive rate of speed; I will not consider this extra two miles per hour however in deciding this case.

Counsel for the plaintiff has sought to impress me with the Borough of Carlisle v. Brisbane, 113 Pa. 544, as entitling the plaintiff in this action to a recovery. This case has been thoroughly gone into in 9 District

and I feel as though further discussion by me at this time can add nothing in showing where that case and the one at bar differs as to the guest's right of action. However I will endeavor to distinguish the cases.

The Borough of Carlisle v. Brisbane was a case in which the facts were not unlike those in this case under review with the exception, however, of one particular, which we must regard as important and to which we will later advert. It appeared that the borough was engaged in macadamizing the road. Brisbane, a stranger in the town, was taken by his friend in a sleigh to visit the poor-house in the afternoon, when ground was covered with snow, and in the evening was driven back along said road referred to. There was nothing to give warning of an obstruction. The driver took to the middle, sleigh overturned and Brisbane was injured. He was found entitled to recover. By way of defence, the borough offered to show facts from which contributory negligence in driver might be imputed to Brisbane and court rejected offer because the driver was not a common carrier.

Subsequently, a point of charge was presented in behalf of defendant to which trial Judge Sadler made reply in part as follows:

"The failure of Cornman to drive with ordinary care would not of itself prevent a recovery by plaintiff (under the relation which has been shown to have existed between him and the former.) The negligence of Mr. Cornman, (the driver) is not to be imputed to the plaintiff if *the latter acted as a reasonably prudent man would have acted under like circumstances.* But we instruct you that [if the plaintiff by the exercise of ordinary care could have seen that a portion of North St. was undergoing repair, and that portion was not fit for travel and at the junction of said street with the Poor-house road, a safe and easy road was provided and opened on said street for travel and this was so well marked that no person in the exercise of ordinary prudence could have failed to see it by twilight or moonlight, then it was his duty if he had the time after making such observation to have interfered and changed the direction in which Mr. Cornman was driving his sleigh or secured its stoppage before the accident occurred; if he failed to do so he was guilty of contributory negligence and could not recover.]

The particular in respect of which the Borough of Carlisle v. Brisbane, differs in its facts from case at bar is indicated in that part of the charge above quoted which is in brackets.

In case at bar we are assured that Maple and his friend, did not act, as reasonaly prudent men would have acted under the circumstances. Surely reasonably prudent men would have lights on their automobile, forgetting for the time, also, that they were exceeding the speed limit as prescribed by statute. We think the facts as disclosed, justify conclusion, that unlike Brisbane, Maple had notice that an accident might happen at any moment and that it was his duty to do what was reasonably prudent and in his power to prevent the driver of the car from subjecting him to the jeopardy, which resulted in his injury.—Lohman v. McManus, 9 Dist. 223, to the same effect.

As before intimated we concede that the negligence of the driver was not imputable to Maple.—Carr v. City of Easton, 142 Pa. 139. We

then have the sole remaining question whether there was contributory negligence on the part of Maple, himself, so clearly shown by the evidence, that I may as a matter of law direct a verdict for the defendant. It is entirely settled that this may be done in a clear case, but in a clear case only.

In Crescent Twp v. Anderson, 114 Pa. 643, there was a small gully or ravine across the public road, over which travelers ordinarily crossed by the bridge. Plaintiff driving with her father found the bridge impassable, the flooring having been torn up for repair; and her father then drove through the ravine at the side of the bridge and in so doing the spring catch of the wagon seat broke and plaintiff was thrown out and injured. It was held that though the plaintiff was not affected by the negligence of the driver, yet as she had voluntarily joined in testing a patent danger, she was barred as a matter of law by her own contributory negligence.

Another case in point is Jean v. R. R. Co., 129 Pa. 514, where the same rule was applied to plaintiff who riding with a neighbor in the latter's wagon neither stopped, looked, or listened, nor requested the driver to do so at a railroad crossing.

The essential point in these cases was the *patent character of the danger* and in the latter, in addition, the violation of a fixed rule of law as to the duty of travelers in crossing a railroad, this constituting clear legal negligence.

As I said at the beginning, the case seems clear and I think I can safely lay down the doctrine, that where one person is driving with another for the mutual pleasure of both, with opportunity to see and equal ability to appreciate the danger and should in fact be looking out for himself, but makes no effort to avoid the danger, such person is chargeable with want of care which results in his injury.

As regards the negligence of the defendant, I might say that "in building sewers or digging trenches for gas pipes, municipality must put barriers or lights around or near the excavation, so as to prevent walking or driving into it" (Trickett, Borough Law), and that in this case the city had used the barrier; but as to whether or not the city was negligent in not putting up lights, I deem it not necessary to go into the question, in that the want of lights on the automobile was the proximate cause of the injury.

Judgment accordingly, for the defendant.

OPINION OF SUPERIOR COURT.

Though there are decisions to the contrary, the great weight of authority, including that of the courts of Pennsylvania, is to the effect that the negligence of a driver of a private conveyance will not be imputed to a person riding with him but having no authority or control over him.—29 Cyc. 549; Little v. Central Dist. Co., 211 Pa. 229; Jones v. Lehigh Co., 202 Pa. 81; Dean v. R. R., 129 Pa. 514; Finnegan v. Foster Township, 163 Pa. 135; Carr v. Easton, 142 Pa. 139. "When a person is injured by the negligence of the defendant and the contributory negligence of one with whom the injured person was riding as a guest or com-

panion the negligence of the driver is not imputable to the injured person."—7 A. and E. Encyc., 448 and cases *supra.*

The fact that a person is riding as the guest of another does not, however, relieve him of the duty of exercising due care, and a recovery by him for injuries received will not be allowed if it appears that he was personally negligent.—Little v. Telegraph Co., 211 Pa. 237; Dean v. R. R., 142 Pa. 139; Crescent Township v. Anderson, 114 Pa 463; Carr v. Easton, 142 Pa. 142.

Was Maple guilty of contributory negligence? When the facts are undisputed and but one reasonable inference can be drawn from them the question of contributory negligence is one of law for the court. Although the facts are undisputed the question is for the jury when fair-minded persons may reasonably arrive at different conclusions thereon. But when the court can say from the evidence that ordinarily intelligent, reasonable, and fair-minded men would not and ought not to believe that the plaintiff was acting as an ordinarily prudent person would have acted under the circumstances, the question of the plaintiff's contributory negligence is one of law for the court.—Baker v. Lehr, 97 Pa. 70; L. V. R. R. v. Greener, 113 Pa. 600; R. R. v. Ritchie, 102 Pa. 425.

Applying these principles to the facts of the present case we reach the conclusion that the learned court was right in deciding that Maple was guilty of contributory negligence as a matter of law.

The night was dark; Maple must have known this. It is beyond the range of possibility that one could travel in an automobile on a dark night without knowing that it was dark unless he were blind. The machine was traveling at the rate of 10 miles an hour. Although passing objects may not have been discernible, the vibrations of the car, the frequency of the explosions of the engine, the pressure of the air upon his face would necessarily indicate to Maple the approximate rate at which the car was traveling. The car carried no lights. We do not believe that it is possible for one to travel in an automobile at night without knowing that the machine carries no lights if such is the case.

It seems to us, and we decide, that a person who knowingly rides in an automobile which is not carrying lights and which is traveling at the rate of 10 miles an hour through the streets of a town on a dark night is guilty of contributory negligence as a matter of law. We believe that ordinarily intelligent, reasonable, fair-minded men could draw but one inference from these facts.

In Little v. Telegraph Co., 211 Pa. 237, the plaintiff was injured while riding in a wagon driven by another and it was held that the question whether he was exercising due care was for the jury to determine. *unless the danger was so apparent that a reasonably prudent man would not have taken the risk. In that* event the court may hold him negligent as a matter of law."

The decision of the court is rendered without reference to the statutes quoted in the brief of the counsel for the defendant for it is well settled

that the fact that the person injured was at the time of the injury engaged in a violation of the law does not constitute contributory negligence *per se.*—7 A and E. Ency., 401; Mohney v. Cook, 26 Pa. 342; Ganson v. Wilson, 18 W. N. C. 7.

Judgment affirmed.